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REPORT ON H.R. 313—THE VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

PREPARED BY THE

VETERANS' ADMINISTRATION

SUBMITTED TO THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

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OCT 2 1985

Honorable G.V. (Sonny) Montgomery
Chairman, Committee on
Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased to respond to your request for a report on H.R. 313, 99th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

INTRODUCTION--AGENCY POSITION ON H.R. 313

This measure contemplates numerous changes in present law concerning claims for benefits administered by the Veterans Administration (VA). First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants dissatisfied with VA benefit decisions. Finally, the legislation would substantially revise the current $10 statutory limitation on the fee an attorney may receive for representing an individual claimant seeking veterans' benefits.

The provision of the bill of overriding significance to this Agency and to veterans is title III, which provides for judicial review of individual VA benefit determinations. The remaining titles largely seek to facilitate implementation of this change. We believe the proposed judicial review of individual VA benefit decisions is inadvisable and unjustified, and we therefore oppose adoption of this measure in its entirety. It is our considered opinion that veterans as a group are served far better under our present procedure than under a claim process geared to ultimate judicial review. Accordingly, we oppose enactment of H.R. 313.

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THE VA CLAIM PROCESS

The most salient characteristic of present VA claim procedure, and what we believe is one of its greatest advantages for our beneficiaries, is its informality. Claimants may submit their own applications without need of any assistance. If they believe assistance is needed, VA employees are available who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish competent claim specialists at no charge to assist claimants in the presentation of their claims, regardless of whether the claimant is a member of the organization.

VA adjudication procedures are nonadversary in nature. In almost all cases, a claimant need do nothing more than file a claim. Adjudication of the claim generally proceeds without the necessity of the claimant appearing at a hearing, producing further evidence, or presenting witnesses. It must be noted, however, that hearings are available at any point in the claim process.

The Agency procures records of military service and medical treatment basic to most claims. Where these records prove insufficient to establish the benefit being sought, the claimant is clearly told what additional evidence is required. All evidence submitted by the claimant becomes part of the record without regard to formal rules of evidence. The VA considers its role as a guardian of veterans' rights rather than an opponent, and all evidence which has been submitted by a claimant, or is obtained by the Agency, is considered in arriving at a determination on the claim.

Additionally, it is the policy of the VA to grant the claimant the benefit of the doubt, at both the initial and appellate stages. It is our experience that VA employees try to grant a benefit when possible, and that many claims are allowed by the VA that would be denied under a more adversary process.

Once a decision has been reached, the VA provides the claimant with notice of the decision, as well as notice of hearing and appellate rights. If the claimant disagrees with the decision, it may be appealed within the Agency. The claimant initiates an appeal by filing a Notice of Disagreement which can be nothing more than a simple declaration of disagreement with the decision. On receipt of the Notice of Disagreement, the regional office reevaluates the claim and, if the decision

remains adverse, provides the claimant with a Statement of the Case. The Statement of the Case contains a summary of the evidence, citation and discussion of the pertinent laws and regulations, and the decision on the claim as well as the reasons therefor. The Statement of the Case is designed to assist the claimant to understand the law and the evidence relied upon, as well as the evidence lacking to establish entitlement. With the Statement of the Case, the claimant is provided with instructions for completing an appeal and advised of his or her rights to an appellate hearing. The majority of VA hearings are held at this point in the adjudication process.

Appeals are heard by the Board of Veterans Appeals in Washington, D.C., which makes a complete and independent de novo review of all the evidence of record. As at the regional office level, service organizations continue their free representation before the Board. Our experience has been that these professional representatives, although generally not attorneys, have attained the highest level of competence and expertise in the field of veterans' law. Thus, even though the Agency strives to give all possible assistance, the process also allows for participation of outside representation at no cost to the claimant.

By statute, all BVA decisions must contain separately stated findings of fact and conclusions of law. However, as a matter of policy, all BVA decisions also contain a summary of the contentions and a discussion and evaluation intended to respond to all arguments raised. Accordingly, each BVA decision provides a claimant with a complete explanation of the Board's action on each issue.

This is a brief description of the VA's adjudication process. The consensus is that it is a good one, particularly from the point of view of insuring that every claimant is granted every benefit to which he or she is entitled. In the face of such virtual unanimity we can only question the wisdom of changing the process by subjecting it to judicial review.

JUDICIAL REVIEW--PRO AND CON

Proponents of judicial review argue it would merely provide VA claimants with another opportunity to obtain benefits without producing any changes in the administrative process that would adversely affect claimants' interests. While this

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is an admirable goal and one which the Agency would certainly strive to meet if judicial review were imposed, we believe several possible changes in the process would be likely to occur which would not be in the best interests of veterans or their survivors.

Enactment of judicial review legislation would interject an adversary relationship into what has been a cooperative process. As a matter of principle, the VA should never be placed in an adversary position, much less become an opposing litigant, with respect to any claimant. The presence of repeated challenges to our veteran-oriented process would result, inevitably, in more rigid and formal proceedings. The involvement of attorneys, whose training and experience is primarily based on the adversary structure of the courts, is also likely to increase the potential of our procedures becoming more adversary in nature. One cannot reasonably expect to require an agency to defend in an adversary proceeding without the agency becoming adversary.

Because the function of the VA is to distribute benefits to veterans and their families, the assumption of an adversary position would be a major change indeed. Such a fundamental change to the VA's position and obligation to assist veterans should not be made in the absence of very strong justifications to support such a change.

One other aspect of the participation of attorneys should also be noted. That is the increased cost to claimants. One of the primary purposes of the present attorney-fee limitation, 38 U.S.C. § 3404, is, of course, to preserve a claimant's award of benefits to the maximum extent possible. By continuing this limitation for over 100 years, Congress has recognized the principle that benefits which it created should not be consumed in expensive legal fees, but should be distributed to claimants for the purposes inherent in enacting the benefits program. As noted earlier, the VA's relatively simple procedures for making a claim, and even for pursuing an appeal, do not require the assistance of an attorney. At the same time, the availability of professional help from the veterans' service organizations allows expert, outside representation at no charge to the claimant. In view of the present availability of free, expert assistance, we believe the advantages to claimants which flow from the preservation of virtually their entire award of benefits far outweigh the largely theoretical advantages of attorney assistance.

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We can predict, as we do later in this report, at least some increased costs that would result from the added burdens judicial review legislation would impose on both the Executive and Judicial Branches. One such burden would be the additional effort required to adjudicate a case when litigation is a possible result. We do not mean that our competence must improve to withstand court scrutiny, because improved service is a high priority concern in the Agency on a continuing basis. What we fear is that more time and care will be required at all levels of the claim process in documenting the procedural steps taken and the reasons underlying our conclusions. The additional VA activity required by such increased formality will, of course, constitute an administrative burden that will reduce our capability to actively assist individual claimants to establish their claims. Litigation generated by the availability of judicial review would likewise result in costs to the VA, the Department of Justice, and the courts. New burdens would also be imposed on BVA and the regional offices in dealing with cases remanded by the courts.

Finally, reliance on a centralized body like the BVA for final determinations of veterans' benefit claims maximizes the prospect of consistent determinations, a desirable result which cannot be expected from litigation in the 94 district courts throughout the Country. In our view, a veteran's entitlement to benefits is not a matter which varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending on the judicial district in which the veteran resides. We believe BVA offers a more consistent and systematic approach to claim adjudication, without the frustrating cost and delay inherent in litigation.

In our view, these reasons support a conclusion that the imposition of judicial review on individual benefit decisions, while it might benefit a few individuals, could work to the detriment of veterans as a class by disrupting the informal, nonadversary procedures and the cooperative attitude presently existing between claimants, their representatives, and the VA. Veterans now have a fair and impartial forum, and our procedures afford a full opportunity to present all evidence and have it fully considered.

Aside from the risk posed to veterans as a group, we question whether the need for judicial review of individual benefit decisions has been demonstrated. We are convinced that the VA's adjudication process not only meets the requirements of due process, but provides greater protection to claimants

than is available in comparable proceedings at other agencies. The right to appeal and obtain a de novo review by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective, practical, and uniform method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts. Liberal rules for reopening claims and reconsideration of appeals by the Board also serve to insure justice for VA claimants. The review provided by the Board is independent and the VA has scrupulously maintained this independence.

The traditional arguments in support of judicial review of individual VA benefit decisions can be briefly summarized as follows:

1. Because of the tremendous volume of claims that are processed annually and the thousands of appeals filed, there is a significant opportunity for injustice to occur in the VA system;

2. The distinction between veterans and the claimants for other Federal benefits who are permitted access to the courts is unwarranted and should be eliminated; and

3. The lack of judicial review unconstitutionally denies veterans due process in the handling of their claims.

Any initial persuasiveness of these arguments disappears under even a cursory analysis. The first argument seeks to support the necessity for judicial review on the basis of a possibility of injustice. In fact, however, there is nothing to indicate that the current preclusion of judicial review results in injustice. There is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits.

The argument that veterans have been unfairly singled out in having review of their claims against the Government confined to administrative proceedings also does not withstand scrutiny. Although 38 U.S.C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes can be found throughout the Federal Government and continue to be enforced in a variety of situations. The Administrative Conference of the United States has identified some 40 examples of statutes

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precluding or restricting judicial review of administrative action.

Of course, many of these statutes address specific issues, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or severely restricted in such important areas as selective service classification and processing; grant, denial, and revocation of parole; exclusion orders affecting arriving aliens; and determinations controlling coverage of states and localities under the Voting Right Act. Particularly analogous is the provision of the Federal Employees Compensation Act, 5 U.S.C. § 8128(b), precluding, in language very similar to that used in section 211(a), judicial review of the grant or denial of compensation to Federal employees suffering work-related injuries. Thus, not only have veterans not been singled out for disparate treatment, the informal and supportive nature of the VA's administrative process provides a greater degree of fairness than may be available to participants in other Federal programs.

The argument that the absence of judicial review of individual VA benefit decisions unconstitutionally denies veterans due process of law in the handling of their claims is likewise in error. Due process does not mandate judicial review. As the District of Columbia Circuit Court of Appeals explained in DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir. 1972),

> The Supreme Court has declared that "the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;" "it may," instead, "provide an administrative remedy and make it exclusive . . . ." That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so. (Citations omitted.)

Contrary to the argument advanced, the courts--the branch of Government responsible for determining the constitutional requirements of due process--have not held that the absence of judicial review of individual VA benefit decisions violates due process.

Accordingly, the issue is not one of constitutionality but of preference. The Social Security Administration's experience with judicial review illustrates the difficulties associated

with judicial involvement in administrative determinations concerning benefits. A comprehensive review of the Social Security Administration adjudicatory process by the Center for Administrative Justice in 1977, in a report entitled the "Study of the Social Security Administration Hearing System," analyzed the contributions of judicial review to the Social Security Administration administrative process. The study concluded that any beneficial effect of judicial review on the accuracy of Social Security Administration adjudications is modest at best, while suggesting that such review may have some negative effects. For example, the study noted that district judges, not being specialists in hearing Social Security cases, may lack the perspective of agency appeals officers in assessing the validity of claims. The study also found that the threat of judicial reversal in many cases does not have a measurable beneficial impact on the diligence of agency adjudicatory officials. The study indicated that the creation of judicial precedents in individual benefit cases has had little positive impact on the administrative process. Finally, the study questioned the actual legitimizing impact of judicial review on the adjudication process. Given this background, the VA is unwilling to endorse any proposal which would create a system analogous to that involving the review of Social Security claims.

In summary, it is the VA's position that the present system for the informal adjudication of claims for veterans' benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claims adjudication have not been adequately justified. Of even greater significance, however, is our belief that, while judicial review of VA benefit decisions may result in increased monetary awards to a relatively few individuals, it could work to the detriment of veterans as a class by disrupting the informal, nonadversary nature of our procedures and the cooperative attitude presently existing between claimants, their representatives, and the VA.

In addition to this general opposition to judicial review of individual VA benefit decisions, we are opposed to several of the specific provisions contained in H.R. 313. Attachment I to this report contains a technical critique explaining the basis for our opposition to those provisions of H.R. 313 which we find most troublesome.

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COST ESTIMATES FOR H.R. 313

It is difficult to predic. the number of dissatisfied VA claimants who might decide to appeal to the courts. Based upon the current BVA caseload, and using the Social Security system rate of appeals as a model, however, it may be anticipated that approximately 4,500 VA cases would be filed annually in Federal courts. We are unable to estimate either the costs of the increased caseload on the court system or the cost of the Department of Justice to litigate these cases.

It is estimated that the administrative costs to the VA of enactment of H.R. 313 would be as follows:

Fiscal Year	Administrative Cost (000's)
1986	$53,891.5
1987	9,911.6
1988	10,045.2
1989	8,898.1
1990	9,003.4

These costs do not include any payments of attorney fees that might be awarded pursuant to the authority of the new subsection (i) of 38 U.S.C. § 3404. We are unable to estimate the cost of this provision, since these fees would depend upon the number of the claims allowed, and what each individual judge might consider a "reasonable" fee.

It should be recognized, however, that an attorney-fee award under new subsection 3404(i) would be virtually automatic in any case in which a court sets aside a VA finding of fact as arbitrary, capricious, or an abuse of discretion.

Under subsection 3404(i), a prevailing party would be entitled to an attorney-fee award unless the position of the Government were substantially justified. After setting aside a VA decision under the arbitrary and capricious standard, a court would appear to have little choice but to conclude that the Government's position was not substantially justified. Moreover, the probability of virtually automatic attorney-fee awards is further increased by the fact that, if a court finds special circumstances that make such an award just, it may award fees even though the Government's position was substantially justified.

The administrative costs summarized above are predicated on maintaining the present 65-member limit on the size of BVA. 38 U.S.C. § 4001(a). Based upon the current BVA case backlog

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and the anticipated increase in its workload from judicial review, we believe BVA would not be able to carry out the mandate in section 103(1) of the bill to dispose of appeals in a timely manner if the 65-member limit were continued. Unless an increase in the number of BVA members were authorized, we estimate the average BVA response time would increase to approximately 435 days by Fiscal Year 1990. We believe that to meet the "timely manner" directive, the average BVA response time should be approximately 120 days. To accomplish this goal after enactment of H.R. 313, we estimate that a minimum of 89 members would be required. The appended methodology contains an alternative cost estimate for an expanded BVA, and it should be noted that under this current services approach the administrative costs would be substantially increased.

Finally, it should be recognized that the costs included in the above summary do not include estimated benefit costs. As noted above, it is difficult even to estimate the number of VA cases that would be filed in the courts. To attempt to further extrapolate the number of claimants that would be successful in court and the additional benefit costs that would result from successful cases is virtually impossible.

Rather than engage in sheer speculation, we offer no view on potential benefit costs. The cost-estimate methodology attached as Attachment II, however, does contain one possible benefit cost scenario as well as a detailed explanation of the other costs we anticipate would result from enactment of H.R. 313.

Advice has been received from the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Everett Rozy Deputy Administrator • Fol

HARRY N. WALTERS
Administrator

Enclosures

ATTACHMENT I

TECHNICAL CRITIQUE OF H.R. 313

TITLE I -- ADJUDICATION PROCEDURES

Many of the adjudicatory procedures included in title I merely restate, or attempt to restate, existing Agency practices. Others, however, are clearly intended to complement the judicial review provisions contained in title III of the bill by adding to existing practices or creating new ones.

Section 101 of the bill is an example of a provision attempting to restate an existing Agency practice. Section 101 would add a new section 3007 to title 38, United States Code, entitled "Burden of proof; benefit of the doubt." For the most part, new section 3007 merely codifies, under a different name, the "reasonable doubt" doctrine now set forth in 38 C.F.R. § 3.102.

We have no objection to this provision to the extent that it accomplishes this purpose. However, an additional component of the VA's regulation is missing--a requirement that the finding to be proved be one within the range of probability and not "pure speculation" or a "remote possibility." Without this qualification, section 3007 could result in allowance of inappropriate claims.

For example, differences of opinion between physicians as to the proper interpretation of medical findings or case histories are common. Many times, the differences of opinion arise because the physician or physicians supporting one side of an issue do so on the basis of a theory not generally recognized or supported by the medical profession. In a case involving this type of difference of medical opinion, in spite of an appearance of an approximate balance of positive and negative evidence, the VA should not be required to allow the claim.

Section 103 of the bill imposes a directive that BVA should consist of sufficient personnel (Board members up to the statutory limitation plus support staff) to carry out its duties "in a timely manner." To meet this "timely manner" directive, we believe that the average BVA response time should be approximately 120 days. Based upon the current BVA case backlog, the present 65 Board member limitation, and the anticipated increase in the Board's workload from judicial review, we estimate average BVA response time would increase to approximately 435 days by Fiscal Year 1990. To meet the "timely manner" directive, we estimate that a minimum of 89 Board members would be required.

We note that other provisions of section 103--to increase the maximum number of Board members to 65 and to redesignate associate members as members--were enacted into law by passage of Public Law 98-223 in 1984.

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Section 106 of the bill would amend section 4004 of title 38 to, inter alia, modify the circumstances under which BVA may reopen and allow a previously disallowed claim on the basis of new and material evidence, by eliminating the present requirement that such evidence be "in the form of official reports from the proper service department." The question as to whether particular items of evidence are new and material would properly remain within the Board's discretion.

The VA has a liberal policy with respect to permitting individuals to reopen claims on the basis of new and material evidence. And, absent new and material evidence, a claimant may request reconsideration of a prior BVA decision on the basis of obvious error, or administrative allowance on the basis of difference of opinion. 38 C.F.R. § 19.5.

Although the enlargement of the Board's jurisdiction proposed in section 106 may be intended to correspond with the Board's present practice, it would undermine a crucial distinction. Currently, the thrust of section 4004(b) is that all service records are considered as constructively in the VA's possession regardless of when the Agency actually receives them. Thus, if the actual receipt of such records permits a decision favorable to the claimant, the effective date of the allowance relates back to the date of the original claim or date of discharge as appropriate.

When the Board reconsiders and allows a claim on the basis of new and material evidence in a form other than service records, however, the allowance is considered to have been made on a new factual basis. In such cases, the application for reopening or the submission of the new and material evidence, in effect, constitutes a new claim, and the effective date of the benefit grant is governed by the date of the new claim.

We believe this distinction should be preserved, and accordingly oppose section 106's modification of the Board's jurisdiction.

Section 108 of the bill would amend section 4009 of title 38 to restrict the Board's present discretionary authority to determine whether the medical complexity or controversy involved in a particular case warrants an independent advisory medical opinion. Under this provision, the Board would be required to secure an Independent Medical Expert's opinion (IME) if a claimant requests one and the record discloses a "substantial disagreement" on a material issue between two physicians' "substantiated findings or opinions." Should the Board deny the claimant's IME request, it

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would be required to state its reasons in writing; the Board's decision not to secure an IME would not be subject to judicial review.

In our view, notwithstanding the safeguard barring judicial review of the Board's decision on an IME request, enactment of this provision would in all likelihood significantly increase the number of IME requests and, therefore, the number of IME's. Currently, the Board obtains about 200 IME's annually. Seventy-three medical schools participate in the IME program, in which cases are referred to the schools for evaluation by school-designated medical specialists. We must assume a marked increase in the number of IME's to be obtained should this provision be enacted. No conscientious representative would wish to overlook any possible resource, and we believe the number of IME's required would track the number of IME's requested by claimants and their representatives.

The anticipated increase in the number of IME opinions could not be handled by our present IME program. New sources of expert medical opinions would have to be developed, undoubtedly at an increased cost to the Government. Conceivably, this provision could lend itself to abuse as sources of medical opinion begin to compete for the business of providing IME's.

Moreover, under this provision, any IME request would have to be premised on a disagreement between two physicians. To the extent that a claimant would have to bear the expense of securing a private physician's "substantiated findings," we suggest that this provision would lead to additional medical expenses for many claimants without any concomitant enhancement of the likelihood of a favorable outcome.

Therefore, while we would not object to a reasonable expansion of the Board's capacity to request IME opinions, we believe enactment of section 108 would result in unduly higher costs not only for the Federal Government but also for claimants, with the potential for creating unwarranted delays in appeal dispositions and stimulating unnecessary controversies within the medical community.

Section 109 of the bill would amend chapter 71 of title 38, relating to the Board generally, to add a new section 4010 entitled "Adjudication procedures," and a new section 4011 entitled "Notice of procedural rights." New section 4010 would, for the most part, merely codify certain procedures currently found in VA regulations. One provision of this new section permitting the use of interrogatories, however, presents a major change in our procedures. This provision would enable a claimant to serve written interrogatories on any person, including a VA employee, which must

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be answered "separately and fully in writing and under oath" unless the person served with the interrogatories objects in a writing filed with the Administrator. If an objection is filed, the VA, under regulations to be prescribed consistent with the standards applicable to protective orders in Federal district courts, would be required to evaluate it and either direct a response within a time certain or indicate that no response is necessary. In the event of a failure to answer or a failure to answer responsively, the VA would be required, upon a showing of "general relevance and reasonable scope," to issue a subpoena for the proposed witness' deposition on written questions. The deposition must be held within 100 miles of the witness' home or place of employment or business, and any subpoena would be enforceable by a Federal district court contempt proceeding pursuant to 38 U.S.C. § 3313.

These complex, burdensome provisions are apparently intended to furnish additional means to claimants seeking to gather evidence. The Agency, however, currently has the authority under 38 U.S.C. § 3311 to compel the production of evidence. The interjection of burdensome procedural routines into our nonadversary proceedings is inconsistent and unnecessary. It would place the VA into the role of enforcer, and unnecessary criticism and controversy, not to mention paperwork and expenditures, would result with no assurance of a corresponding benefit to our claimants.

We also have objections to new section 4011 "Notice of procedural rights." This provision would require written notice of procedural rights "at each procedural stage" in easily understandable language. The notice would include descriptions of subsequent procedural stages, available rights, and procedures necessary to secure review.

We currently provide detailed notice of procedural rights at relevant stages of the adjudication process. A mandate to furnish individualized notice at every procedural stage is unduly burdensome and could create confusion among claimants. We object to this provision to the extent it is intended to require the Agency to furnish individualized, duplicative notices that go far beyond adequacy and fairness.

The last provision of title I of the bill which we find particularly troublesome is section 110. This section would mandate a two-pronged study, lasting two or three years, to test alternative methods aimed at resolving benefit claims more efficiently and at a location more convenient for claimants.

The first pilot program would create an additional intermediate level of adjudicatory-appellate review at the regional office

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level in at least three geographic areas. In effect, a claimant could request a second de novo consideration of a claim by a new adjudication panel at the agency of original jurisdiction, be afforded a second hearing, and receive a second Statement of the Case, all before proceeding with an appeal to BVA.

We can understand the inclination of the drafters of this provision to believe that a "second look" may result in reducing BVA's docket because decisions favorable to claimants would not be appealed and some claimants may simply decide to forego further appellate proceedings. Whether such a reduction in the Board's docket would actually occur, however, must be regarded as highly speculative. We believe a reduction in appeals to BVA could only be achieved if the "second look" procedure significantly increased the number of claimant-favorable outcomes. In view of the high degree of quality and consistency we have achieved in our regional office decisionmaking procedures, we regard this as improbable. On the other hand, this pilot program can be expected to add unnecessary delay to consideration of claims at the selected regional offices.

Accordingly, we are of the opinion that adding one more layer of review would not be of significant value to either claimants or the Agency. There simply has to be a limit to the number of times a claim is evaluated. At present, a claim, once initially denied, is reconsidered upon the filing of Notice of Disagreement prior to the preparation of a Statement of the Case, reconsidered again upon receipt of a Substantive Appeal, and reviewed de novo by BVA. In view of the foregoing, we seriously question the utility of the aspect of the mandated study which would require a trial program of additional adjudication.

The second pilot program that would be mandated by section 110 would require an enhanced schedule of "traveling BVA" panels, on at least a quarterly basis in at least three geographic areas, for the purpose of increasing the number of BVA field hearings. The idea that increasing the number of travel board hearings will enhance "fairness" is, apparently, based on statistics indicating higher allowance rates in cases where a travel board hearing is held than in cases where a BVA hearing is held in Washington, D.C.

We regard this premise as sheer conjecture. Although it is currently true that local hearings before a BVA travel board statistically yield more claimant-favorable outcomes, we believe the reason is more closely attuned to the nature of the cases than to the place of the hearing; in our experience, claimants' representatives often advise claimants to request travel board hearings when they believe the case to be particularly meritorious.

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In this way the representative may receive the personal and professional satisfaction to be derived from successful "portal to portal" advocacy.

We believe that increasing the number of travel board hearings would have little effect in reducing the number of hearings in Washington, D.C. Increasing the frequency of travel board visits, however, would result in fewer Board members being available to decide cases in Central Office, thereby increasing overall response time. Accordingly, we oppose increasing travel board visits as mandated by section 110.

TITLE II--VETERANS' ADMINISTRATION RULE MAKING

This title of the bill would require VA rulemaking procedures to comply with the provisions of 5 U.S.C. § 553 notwithstanding the exemption in subsection (a) of that section of matters pertaining to "agency management or personnel or to public property, loans, grants, benefits, or contracts."

With respect to benefit-related regulations, it should be observed that the Agency has voluntarily been in substantial compliance with the requirements of section 553 since April 1972. At that time, a regulation, 38 C.F.R. § 1.12, was promulgated which requires notice of regulatory changes to be published in the Federal Register in accordance with the provisions of the Administrative Procedure Act (APA). This regulation is binding on all elements of the VA.

Therefore, it is our current practice to publish proposed benefit regulations in the Federal Register in advance of their effective date, offer the public opportunity for comment, and publish our final version of the regulations with a summary of the comments received and the reasons they were or were not accepted. In view of our voluntary compliance, the proposed section is simply unnecessary.

As a technical matter, however, title II would effect not only a waiver of the exemptions for loans, grants, and benefits, but would also end the exemption now embodied in subsection (a)(2) of section 553 for rules relating to "agency management or personnel." We strongly support the position that Agency management and personnel matters should be exempt from the rulemaking requirements of section 553. VA and other Federal agency personnel matters involve a vast range of issues, such as leave, hours of employment, conduct requirements, clothing requirements, etc., in which the public has little or no interest. In many instances, such matters are already the subject of participatory decision-making in the form of collective bargaining.

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Congress has had opportunities to modify the APA exemption provisions over the years. In fact, several bills to accomplish this were before past Congresses. The basic provision, however, has remained unchanged since enactment of the APA in 1946. We question the need to single out the VA on this issue when we have already waived our right to claim the exemption through our regulation in those areas in which the veteran public has a true interest.

TITLE III -- JUDICIAL REVIEW

As noted earlier, title III, which would establish a statutory scheme for subjecting the VA to judicial review, is the provision of H.R. 313 of overriding significance to veterans and this Agency.

Under title III, judicial review would be authorized by expanding the current list of exceptions to nonreviewability--insurance and loan guaranty matters--with a reference to a new chapter 72 of title 38, entitled "Judicial Review." This new chapter, set out in section 302 of the bill, would contain new sections 4025 through 4029 of title 38, entitled "Jurisdiction," "Scope of review," "Remands," "Survival of actions," and "Appellate review."

We believe several of the provisions in new chapter 72 could create problems in the administration of veterans' programs. Initially in this regard, we believe that the 180-day period in which to file a complaint for judicial review provided by new subsection 4025(a) is too long. By the time a claim has progressed through regional office review to the BVA and has been decided de novo by that body, the issues in dispute will certainly have crystallized. In the interest of expeditious handling, both in the Agency and the courts, a 60-day limit on the right to bring an action would be sufficient. It is noteworthy that the statute authorizing judicial review of Social Security decisions specifies a 60-day period for bringing suit.

Further, we note that under new subsection 4025(a), venue for such an action lies not only in the judicial district where the plaintiff lives or maintains a principal place of business, but also where BVA has its principal offices. This provision could result in a disproportionate caseload on the United States District Court for the District of Columbia.

The inclusion of proposed subsection 4025(b), which would eliminate the use of 38 U.S.C. § 211(a) as a bar to any civil action "otherwise authorized by law," in a section entitled "Jurisdiction" is misleading. The provision does not appear to be intended to provide a specific jurisdictional basis for a suit.

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Rather it appears to be intended to eliminate use of section 211(a) as a defense in judicial challenges to VA actions which, if taken by any other Federal agency, would be reviewable in the courts. However, faced with the express directive in new section 4026 to apply its provisions in any action brought under section 4025, and the fact that elimination of the use of subsection 211(a) as a bar is included in section 4025 entitled "Jurisdiction," a court could conclude that Congress intended subsection 4025(b) to operate as a jurisdictional grant.

Proposed subsection 4025(f) would require the Agency to file with its answer a certified copy of the records upon which the decision complained of is based, or an index of the materials comprising such records. As a practical matter, because in some cases the records are voluminous and the same personnel preparing the Agency's answer will be responsible for reviewing the completeness and accuracy of the documents to be filed, concurrent filing of the record may in some cases prejudice the Agency's ability to timely answer the allegations in the complaint. In our view, a requirement that a certified copy of the records or an index be filed within 60 days of the answer would protect the Government's interest while not unduly delaying the proceeding.

We support the inclusion of a sunset provision, subsection 4025(h), in this legislation. We are concerned, however, that the term "initial claim for benefits" may be interpreted to permit the filing far beyond the 5-year sunset period of an action for review of a BVA decision on reopening or reconsideration of a claim, so long as the initial claim which is sought to be reopened or reconsidered was filed within the 5-year period.

Perhaps the most significant problem inherent in any legislation that would subject VA benefit decisions to judicial review is the difficulty in defining an appropriate scope of review. It is our opinion that any scope of review provisions adopted should be sufficiently narrow as to permit judicial action only in those few cases in which a VA benefit may have been unjustly denied. In the same vein, it is equally important that judicial review is limited to only those questions suitable for judicial determination, and that complex and technical factual questions that can best and most fairly be decided by the Agency not be subject to second-guessing by the courts.

H.R. 313 attempts to meet these or similar goals by restricting a reviewing court's authority to reverse a decision of the VA on a factual issue only upon a finding that the Agency's decision was arbitrary, capricious, or an abuse of discretion, and only after first remanding the case to the Administrator for reconsideration

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or further substantiation of the record. We recognize that the drafters' intent in selecting the arbitrary and capricious standard may be to restrict reviewing courts to a more narrow scope of factual review than that permitted under the substantial evidence standard of the Administrative Procedure Act and applied in Social Security cases.

Nevertheless, the legal community remains undecided on such basic questions as whether the arbitrary and capricious standard and the substantial evidence test are equivalent, and if not, which test calls for the broader standard of review. Levin, Federal Scope of Review Standards: A Preliminary Restatement, 37 Ad. L. Rev. 95, 121-123 (1985); K. Davis, Administrative Law Treatise § 29.7 (2nd ed. 1984); and compare Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967) (substantial evidence test affords considerably more generous review than arbitrary and capricious test) with Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (decision may be arbitrary and capricious if based on a clear error in judgment), Bowman Transportation Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 284 (1974) (agency motion may be arbitrary and capricious although supported by substantial evidence), and Pacific Legal Foundation v. D.O.T., 593 F.2d 1338, 1343 n. 35 (D.C. Cir. 1979), cert. denied, 444 U.S. 830 (1971) (abuse of discretion if action not supported by substantial evidence). Although it has been suggested that the clear error language of the Overton Park decision may have been inadvertent, the decision has been followed in subsequent cases concerning administrative decisionmaking. See City of Hartford v. Towns of Glastonbury, 561 F.2d 1032, 1043 (2d Cir. 1976), cert. denied, 434 U.S. 1034 (1978). Because of this recognized uncertainty surrounding the various standards of factual review and the willingness of the courts to disregard statutory distinctions, we are concerned that any standard of review of factual aspects of VA benefit decisions will open the door to confusion and unwarranted judicial intervention. Although the view has been expressed that veterans cannot obtain complete review of their claims without some measure of judicial oversight of Agency factual determinations, we feel the problem of defining a standard which will preclude excessive judicial intervention in the administrative process makes judicial oversight of fact-finding unworkable.

Further, we believe that judicial review of administrative determinations involving factual issues is particularly inappropriate and unnecessary in the case of the VA, in view of the Agency's liberal policy of assisting claimants in establishing entitlement to all benefits for which they are eligible under law. Moreover, the efficacy of judicial review of administrative fact determinations is substantially reduced by the governing principle in VA

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proceedings that reasonable doubt is to be resolved in favor of the claimant.

Finally, we are concerned that any standard of factual review may interfere with the crucial role of Agency fact-finders in assessing witness credibility at administrative hearings. The potential for difficulty in this area exists because the claimant in a VA claim proceeding may in many cases be the only witness regarding key issues, see Brooks v. Cleland, 531 F. Supp. 103 (E.D. Mich. 1982), and crucial factual determinations may turn on the creditability of his or her testimony. A court, if permitted to review factual findings, may be reluctant to uphold an Agency fact-finder's determination, properly based on an assessment of the claimant's credibility, which is inconsistent with the claimant's otherwise uncontradicted testimony of record. See Dickinson v. United States, 346 U.S. 389 (1953).

Although a detailed explanation of the administrative fact-finder's reasons for rejecting testimony may satisfy the court, White Glove Building Maintenance, Inc. v. Brennan, 518 F.2d 1271 (9th Cir. 1975), adequate articulation of such judgments would place an additional burden on busy adjudication personnel. Moreover, there may be reluctance on the part of the fact-finder to question in writing the veracity of a veteran. In this way, the vital role of the administrative fact-finder may be subverted.

For all of these reasons, we believe that any attempt to provide judicial review of VA factual determinations regarding benefit claims would be subject to expansive interpretation by the courts and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans. We therefore recommend, if judicial review of VA benefit determinations is considered necessary, it be confined to review of purely legal issues.

TITLE IV--ATTORNEYS' FEES

Section 401 of the bill would modify the present attorney-fee limitation found in 38 U.S.C. § 3404 by amending subsection 3404(c) and adding six new subsections, (d) through (i). Under proposed subsection 3404(c), the Administrator would be authorized to approve attorney's fees above the present $10 maximum for services rendered in representing a claimant before the VA following the claimant's receipt of a Statement of the Case. The $10 maximum would be retained in cases resolved prior to that point in the VA's adjudicatory process. An attorney's fee for representing a VA claimant after receipt of a Statement of the Case would be limited to the lesser of:

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1. The fee agreed upon by the claimant and the attorney; or

2. a. $500 (which could be increased administratively for all cases by the Administrator in future years as warranted by changed national economic circumstances, or in an individual case based upon the presence of extraordinary circumstances in the case warranting a higher fee); or

b. not more than 25 percent of past-due benefits if the claimant and attorney have entered into an agreement under which no fee is payable unless the claim is resolved in a manner favorable to the claimaint.

Our first concern with title IV arises in regard to the provisions authorizing the Administrator to determine and approve a fee in excess of $500 in cases involving "extraordinary circumstances." We recognize this provision might prevent a few instances of awarding unreasonably low fees in complicated cases. It should also be recognized, however, that this provision presents the very real possibility that a significant number of attorneys will attempt to characterize their cases as involving "extraordinary circumstances," thereby adding a further administrative burden on the VA.

The additional burden resulting from the determination of excess fees is particularly troublesome in that it will require the Agency to perform a regulatory function under a very vague standard that is quite different from the benefit distribution functions normally involved in VA adjudications. Moreover, the Administrator's role with respect to determining fees in excess of $500 differs substantially from that required in all other cases. In other cases, the Administrator is only authorized to approve a fee under a very specific statutory scheme, not actually determine its amount. Accordingly, we oppose this provision, and suggest, if Congress believes such authority is necessary, that the statute itself should provide some guidance or standards as to what would constitute "extraordinary circumstances."

New subsection 3404(d) would authorize a court to determine and approve an attorney's fee in cases appealed to court under the new judicial review chapter added by this bill. If the case is resolved in a manner favorable to the claimant (as that result is defined in new subsection 3404(h)) the court may determine a reasonable fee to be paid by the claimant. In such cases, the court's authority is limited only when they involve contingent

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fee agreements, where the fee may not exceed 25 percent of the total amount of past-due benefits awarded.

Presumably, the court could not determine or approve a fee in a case resolved in a manner favorable to a claimant which involved a contingent fee agreement when its review did not result in an award of past-due benefits. In cases resolved in a manner favorable to the claimant but not involving a contingent fee agreement, there is no limit on the amount a court could determine as a reasonable fee.

If a case is not resolved in a manner favorable to the claimant, the court would be limited to determining a reasonable fee not exceeding $750. In making this determination the court is to consider the extent to which success appeared reasonably probable when the action was filed. The language of new subsection 3404(d) is ambiguous as to whether a court may determine a fee not exceeding $750 in a case not resolved in favor of a claimant notwithstanding that the claimant and attorney have entered into a contingent fee agreement.

Another concern we have with the provisions of new subsection 3404(d) is its grant of open-ended discretion to a court in determining a fee in a case resolved in a manner favorable to the claimant but in which no contingent fee agreement is involved. In our opinion, such unlimited discretion could be exercised inconsistently. Accordingly, we believe that in cases where no contingent fee agreement is involved, a court should be limited to determining a fee on the basis of either a definite percentage of past-due benefits (for example, 25 percent as occurs in Social Security cases) or a specified dollar amount.

Likewise, we are opposed to the provisions of new subsection 3404(f) which would authorize court review of the Administrator's approval of an attorney's fee to determine whether it constituted an abuse of discretion. Initially in this regard, we note that there appears to be no apparent need for such court review in the overwhelming majority of cases. Except in cases involving "extraordinary circumstances," the Administrator's role with respect to fees is limited to merely approving a reasonable fee under very specific statutory limitations.

The Administrator is authorized to determine a fee only in cases involving "extraordinary circumstances" warranting a fee in excess of $500. Although it appears that this authority is intended to be used only rarely, as noted above, we believe that a significant number of attorneys will attempt to obtain fees in excess of $500. Permitting court review of the Administrator's determinations on such requests will merely serve as an incentive

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to request excess fees, and thereby increase the burden on both the Agency and the courts.

It should also be recognized that under title IV, an attorney's fee would be subject to the process of arms-length negotiation between the claimant and the attorney. Further, there is no reason to assume that the attorney's fee was not freely negotiated. As such, we believe that minimal governmental intervention into the attorney-claimant relationship, by either the Agency or the courts, is appropriate. To the extent that disputes between attorneys and claimants arise with regard to issues other than compliance with the statutory limitations, they can be adequately resolved through state and local bar association disciplinary mechanisms.

Finally, in further support of our opposition to judicial review of VA action on attorney fees, we note that the nonreviewability of final Social Security Administration fee determinations is well established in the case law. In Copaken v. Secretary of Health, Education, and Welfare, 590 F.2d 729 (8th Cir. 1979), the court ordered dismissal of the action for lack of subject-matter jurisdiction over Social Security Administration determinations of attorney fees. The appellant attorneys had alleged that the Social Security Administration's approved fee, which was less than 25 percent of the past-due benefits award, was arbitrary and capricious and an abuse of discretion. Further, they alleged that the Secretary's failure to provide an evidentiary hearing violated the due process clause of the fifth amendment. Appellants requested that the attorney-fee determination be set aside and the case remanded to the Secretary to set a reasonable and adequate fee. The court held that it lacked subject-matter jurisdiction to review the Secretary's attorney-fee determination because such action is entrusted exclusively to agency discretion. The court observed that the administrative appeals procedures followed by the Social Security Administration (20 C.F.R. § 404.975) provided adequate protection even in the absence of a hearing.

In addition, the court noted that a "legitimate and commendable governmental interest in utilizing maximum amounts of time and money on behalf of those the Act was primarily intended to benefit could be seriously impeded by provision of full evidentiary hearings on attorney petitions for fees." Id. at 732. We fully support that conclusion and, accordingly, are opposed to judicial review of any agency attorney-fee determination.

Finally, in regard to the attorney-fee provisions of H.R. 313, we object to the provisions of new subsection 3404(i), which would authorize a court in an action brought under the new judicial

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review chapter added by this bill to award attorney fees and costs to a prevailing party, other than the Administrator, where it finds that the position of the Administrator was not substantially justified or special circumstances make an award just.

Initially, in view of the likelihood of reauthorization of the Equal Access to Justice Act (EAJA) we question the equity of, and the need for, a provision specifically intended to govern fee awards against the Government only in cases brought by VA claimants. New subsection 3404(i) and the EAJA share a common purpose, to govern the awarding of attorney fees against the Government in litigation. Unlike the EAJA, however, subsection 3404(i) is a relatively minor provision of a complex bill intended to accomplish a variety of purposes, most of which must be viewed as more significant than that to be accomplished by subsection 3404(i). As a result, the consideration and attention to be afforded subsection 3404(i) must, by necessity, be limited.

On the other hand, the awarding of attorney fees against the Government is the primary purpose of the EAJA. Accordingly, the attention of all involved in the legislative process of reauthorizing the EAJA will be directed exclusively to that purpose. And more importantly, reauthorization will reflect the consensus reached by all involved in the process as to how that goal can be best accomplished. In our view, the results of such specialized consideration and attention should be available to VA claimants on the same basis as they will be available to any other litigants who prevail against the Government.

Another concern we have with the provisions of subsection 3404(i) is the absence of any provision, such as that included in EAJA legislation, limiting the amount a court may award. (For example, H.R. 2378, passed by the House on June 24, 1985, provides that an attorney fee may generally not be awarded in excess of $75 per hour.) If, notwithstanding the above objections, Congress believes that a specific provision to govern awards of attorney fees only in VA benefit cases should be enacted, we believe the Government's liability should be limited.

In VA benefit cases, rather than merely setting a limit on the hourly rate an attorney may receive as occurs in H.R. 2378, we believe that the amount of any fee award should be limited to the amount the claimant would have been liable to pay his or her attorney had the court made no such award.

Limiting the Government's liability for attorneys' fees in this manner would accomplish several desired results while protecting public funds from any possible abuse through excessive awards. First, and most importantly, such a limitation would serve the

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purpose of reimbursing a claimant for any attorney fee actually incurred in those few cases where the only necessity for seeking court review was patently unwarranted action on the part of the VA in its consideration of the claim. Additionally, liability for a fee, even if limited in this manner, would continue to serve as a deterrent to the VA and encourage the Agency to avoid unwarranted action in the future. Likewise, since the statutory scheme provides for the payment of reasonable attorneys' fees by the claimant (except in punitive award cases), limiting the Government's liability to the same extent in no way results in a loss to the claimant's attorney. An attorney will receive exactly the same fee upon which the attorney and claimant agreed prior to bringing the action.

Finally, such a limitation would serve to complement our earlier suggestion that in those cases where a contingent fee agreement is not involved, the court's discretion in determining a reasonable fee for an attorney should be limited to either a definite percentage of past-due benefits or a specified dollar amount. Taken together, these two suggestions would provide a relatively simple method by which a court could determine a reasonable attorney's fee, to be paid by the claimant or the Government as found to be appropriate, with a minimum of judicial time and effort.

TITLE V--EFFECTIVE DATES

We strongly oppose section 502 of the bill, which would authorize judicial review of BVA decisions rendered on or after January 1, 1977, and before the effective date of the bill. This retroactive feature, in addition to substantially increasing the costs of the bill, would present a significant possibility that the number of cases filed shortly after the bill becomes effective could be so great that they would be virtually unmanageable.

There will have been over 200,000 BVA denials between January 1, 1977, and the end of Fiscal Year 1985. Assuming only 10 percent of these denials were appealed to the courts, this would result in over 20,000 cases being added to the district courts' dockets within 180 days after the bill becomes effective. These 20,000 cases would be in addition to the approximately 2,250 cases that we anticipate would be filed during that same period to appeal BVA denials rendered after the bill's effective date. Obviously, such a high, immediate influx of cases would create acute administrative problems, not only for the VA, but for the Department of Justice and the courts as well.

ATTACHMENT II

COST-ESTIMATE METHODOLOGIES

Impact Assessment - Judicial Review, H.R.313

I. General

A. Purpose. The purpose of this paper is to assess how judicial review under H.R.313, introduced on January 3, 1985, would impact upon the organization, operations, workload and costs of the Board of Veterans Appeals.

B. General Assumptions and Considerations. Certain broad assumptions and considerations were essential for the development of this impact assessment. Some of the more critical of these general assumptions are as follows:

1. The statutory limitation on the number of board members [38 USC 4001(a)] will remain at "not more than 65." This statutory ceiling effectively limits BVA organization to not more than 21 board sections. No other critical aspect of management/organization of the BVA is limited in this manner, and consequently, this ceiling is the controlling variable in most of the workload and cost estimates developed in this assessment. The most notable outcome associated with this assumption is a significant drop in decision output from the current service level and an equally significant rise in the BVA response time relative to the current service level. Since this resultant response time may be unacceptable, analysis in this impact assessment has been conducted under two approaches, as follows: (1) assuming that the 65 board member limitation will remain in effect; and (2) assuming that the 65 board member limitation will be lifted and that the BVA will be expected to perform at or near the current service level with respect to response time. Where assumptions, variables, and/or projections that pertain to the current service level analysis differ from those developed under the 65 board member constraint, they will be shown separately in reduced type size.

2. BVA decisions must continue to be responsive to appellants while meeting the requirements imposed by the courts. BVA decisions would have to be enlarged to include a detailed recitation of all evidence in order to permit the court to determine relevancy and commensurate weight. This will increase the average length of a BVA decision by 50% from 170 lines per decision to 255 lines per decision.

3. In the absence of a more appropriate model, certain experiences of the Social Security Administration's Office of Hearings and Appeals have been used to develop projections used in this impact assessment. The specific SSA data elements used for this purpose are as follows:

   - o Court filing rate as a percentage of SSA(BVA)denials: 20%
   - o Percentage of court filings remanded to SSA(BVA): 30%

4. The overall composition of BVA dispositions and receipts under judicial review will not vary significantly from the current composition. Significant factors are as follows:

   - o BVA denial rate: approximately 70%
   - o BVA remand to field rate: approximately 15%

- o Field rate of return to BVA of remands: approximately 75%
- o Receipts. The following rates are used for anticipated BVA workload receipts for FY 1986 and subsequent years:

  a. New Appeals: 36,900
  b. Nonoriginal Appeals (i.e., remands returned from field and reconsiderations): 3,500
  c. Court Remands: 1,300

Receipts, Current Service Level. At the current service level, BVA output rates are greater than under the 65 board member limitation. Since the overall number of dispositions are greater at the current service level, both the number of remands returned from the field and the number of court remands to the BVA will be proportionately greater. Projected receipts at the current service level are as follows:

a. New Appeals: 36,900
b. Nonoriginal Appeals (i.e., remands returned from the field and reconsiderations): 4,700
c. Court Remands: 1,750

5. The provisions of §105 authorizing review of BVA decisions rendered on or after January 1, 1977 will result in additional court filing during the first year in which judicial review becomes effective. There will be approximately 202,000 BVA denials between January 1, 1977 and the end of Fiscal Year 1985. We estimate that roughly 10% of these BVA denials will be appealed to the courts and that 30% of these cases will be remanded to the BVA for further development. This would result in approximately 6,060 additional court remands during the first year of judicial review experience.

C. Professional Staff Workrate Standards Impact. Due to increased complexity, more recitation of evidence, findings of fact, and conclusions of law, BVA decisions will require more development and review time.

1. Board Members. Workrate standards for board members will increase by 25% from 2.8356 standard hours per decision (FY 1984 actual) to 3.5445 standard hours per decision

2. Attorneys. Workrate standards for attorneys will increase by 50% from 5.5864 standard hours per decision to (FY 1984 actual) to 8.3796 standard hours per decision.

D. BVA Output Capacity.

1. Board Member Output Capacity. As described in paragraph B1, the total output limits of board members will form the overall disposition output limit for the BVA. Dispositions in this context include all BVA decisions and actions taken on cases remanded to the BVA from the courts. For computation purposes, time requirements for court remands have been estimated as equivalent to average time requirements for BVA decisions. The following formula has been used to project the maximum annual BVA disposition limit.

Maximum Annual Dispositions = Board Members Annual Hrs Available - adjusted workrate standards

Maximum Annual Dispositions = 32,500

Board Member Output Capacity, Current Service Level. This factor does not constitute an output limiting factor at a current service level of analysis.

2. Output Mix. The 32,500 dispositions per year output will be composed of BVA decisions and actions taken on remands from the courts. Court remands will require some priority, and annual BVA output in this category will equal annual receipts. The total BVA output mix can be expressed in the following formula:

Total BVA Output = No. of BVA Decisions + No. of Court Remands

The number of court remands can also be expressed as follows:

No. of court remands = No. of BVA Decisions x (BVA denial rate x Est. court filing rate x Est. court remand rate)
= No. BVA Decisions x [(.7) x (.2) x (.3)]

Combining these two formulas and inserting 32,500 as the total BVA Output figure results in the following projected output mix:

Total BVA Output = 32,500 dispositions per year
No of BVA Decisions = 31,200 per year
No. of Court Remands = 1,300 per year

Output Mix, Current Service Level. The current service level has been defined for the purpose of this analysis as that level of service which will maintain a BVA average response time at or near the current level. This means that BVA dispositions must be balanced against the expected level of receipts to maintain a relatively stable response time. This balance can be achieved with a BVA output of 43,350 dispositions, equaling the anticipated number of receipts, including court remands.

E. Workload and Response Time Estimates. Based upon the preceding assumptions and computations, the following is a composite portrayal of the estimated impact of the proposed legislation upon BVA workloads and response times:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
Appeals Pending, start of Period	39,100	35,050	50,310	59,510	68,710	77,910
Appeals Received	+41,600	+40,400	+40,400	+40,400	+40,400	+40,400
Court Remand Rvcd.	+ --	+ 7,360	+ 1,300	+ 1,300	+ 1,300	+ 1,300
Total Workload	80,700	82,810	92,010	101,210	110,410	119,610
BVA Decisions	-45,650	-32,500	-32,500	-32,500	-32,500	-32,500
Appeals Pending, End of Period	35,050	50,310	59,510	68,710	77,910	87,110
Cases Chargeable to BVA	15,600	22,400	26,500	30,600	34,650	38,750
Avg BVA Response Time (days)	125	252	298	344	389	435

Workload and Response Time Estimates, Current Service Level.

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
Appeals Pending, Start	39,100	35,050	41,110	41,110	41,110	41,110
Appeals Rvcd.	+41,600	+41,600	+41,600	+41,600	+41,600	+41,600
Court Remands Received	+ --	+ 7,810	+ 1,750	+ 1,750	+ 1,750	+ 1,750
Total Workload	80,700	84,460	84,460	84,460	84,460	84,460
BVA Decisions	-43,650	-43,350	-43,350	-43,350	-43,350	-43,350
Appeals Pending, End	35,050	41,110	41,110	41,110	41,110	41,110
Cases Chargeable to BVA	15,600	18,300	18,300	18,300	18,300	18,300
Avg BVA Response Time (days)	125	134	134	134	134	134

F. Hearings. Formal hearings before the BVA do not presently occur with great frequency; only about 4% of BVA decisions currently entail formal hearings. With the advent of judicial review and accompanying increases in attorney representation, we anticipate significant increases in: (1) the overall percentage of BVA decisions entailing formal hearings; (2) the percentage of formal hearings for which transcripts will be required; and (3) the average length of a transcribed hearing.

1. Percentage of BVA decisions entailing formal hearings will rise from approximately 4% to approximately 10%.

2. Percentage of formal hearings for which transcripts will be required will rise from approximately 45% to approximately 90%.

3. Length of formal hearing transcripts will increase by 50% from 775 lines per hearing to 1160 lines per hearing.

G. Independent Medical Expert (IME) Opinions. §108 inserts language into 38 USC 4009 that we estimate would substantially increase the number of IME opinions required for BVA decisions. We estimate that approximately 3,000 BVA decisions per year will require IME opinions. The BVA currently obtains approximately 200-300 IME opinions annually, and some difficulty is occasionally experienced in obtaining medical schools' cooperation in furnishing this level of IME support. Some major revisions to the IME concept could be necessary to support a level of 3000 IME opinions annually.

1. In addition to the costs of the IME opinions, the following estimated increased workload requirements would result from the increased level of IME opinions.

   - o Chief Members will need an additional .5 hours per IME opinion to formulate and review the request letter and to review and approve the adequacy of the opinion.
   - o Attorneys will need one additional hour per case involving an IME opinion. This time is needed for research, preparation of the request, and incorporation of the opinion into the BVA decision.
   - o Each IME opinion will be approximately 60 lines long, and each BVA decision incorporating an IME opinion will be lengthened by approximately 60 lines.

Independent Medical Expert Opinions, Current Service Level. We estimate that the revised language of §108 would result in approximately 4,000 IME opinions at the current service level of performance.

H. Travel Board Alternative Examination. We estimate that the additional travel costs associated with examining the travel board alternatives of §110 would entail an additional $50,000 in annual travel costs for the period over which such a test would be conducted. The amount of board member time consumed with this test could effect their overall productivity.

II. Staffing and Costing

A. Staffing Impact

1. Organizational Structure of the BVA. In addition to a small management team in the Office of the Chairman, the BVA has two major components: (1) the Professional Service; and (2) the Administrative Service:

   - o Professional Service. The Professional Service consists of 21 similarly structured board sections. A typical board section has a chief member (attorney), a medical member (physician), a legal member (attorney), a staff of seven attorneys, and a secretary. Also included within the Professional Service are a number of medical advisers, the Appellate Index and Retrieval Staff (AIRS), and some additional clerical support. Medical Advisers provide advice to the Chairman and the board sections in specialty areas such as psychiatry, neurology, and cardiology. AIRS creates an index that includes each BVA decision, prepares a microfilm

library of redacted (cleared of personal identifiers) decisions, and provides copies of the index and decisions to the public on request.

- o Administrative Service. The Administrative Service maintains the BVA's docket of appeals and personal hearings and provides mail, correspondence, recording and transcription services, statistical reporting, and related support functions.

2. Changes Foreseen. Some basic assumptions regarding the affects upon the BVA of judicial review under H.R.313 were discussed in Part I. The following staffing composition changes and associated costs have been developed using those basic assumptions as departure points for all projections.

   a. Professional Service. The most significant assumption relative to BVA Professional Service staffing under H.R.313 is that the statutory ceiling on board members will remain at 65. Professional and Administrative Service staffing projections have been organized around this basic assumption. Other considerations central to developing Professional Service staffing changes are as follows:

      - o Board section organization and work processes will remain similar to the current structure to ensure continuity and consistency in the BVA's operations and decisions.
      - o The additional BVA work requirements revolving around responding to litigation and meeting increased IME opinion activity will be addressed through staffing changes in the BVA management and professional support groups rather than through alteration to the board section concept.
      - o While the number of board members is capped at 65, revised attorney workrate standards discussed in Part I will require additional staff attorneys.

   Using the assumptions described above, the total Professional Service staffing increase has been projected at a level of 23 FTEE, broken down as follows:

   BVA Management Group:

   1 Deputy Vice Chairman (Medical Affairs)
   1 Deputy Vice Chairman (Litigation)
   4 Legal Technicians (Litigation)

   Attorney Staff:

   12 Attorneys

   Professional Support

2 Medical Advisors
2 AIRS indexers
1 AIRS editor

b. Administrative Service. In addition to the assumptions already discussed in Part I, the following assumptions have been used in projecting additional Administrative Service staffing needs.

o Transcriptionist requirements will be affected by increases in the length of decisions, in the number of IME opinions, and in the number of formal hearings transcribed.

o Hearing Section activities will be doubled, based upon the increased number of formal hearings.

o Correspondence Section workrate standards will increase by 50% due to increased volumes of outside correspondence, increased correspondence complexity, increased records development requirements, and increased records duplication requirements.

o Records and Docket Section workrate standards will increase by 50% due to increases in mail volumes, increased remand traffic, and increased precautionary administrative due process case reviews.

o Additional supervisory and administrative management staff will be required in proportion to projected clerical increases.

Using the assumptions described above, the total Administrative Service staffing increase has been projected at a level of 48 FTEE, broken down as follows:

Transcriptionists - 33
Records and Docket Section - 5
Correspondence Section - 5
Hearing Section - 2
Management Staff (Admin.) - 3

c. Staffing Changes Foreseen, Current Service Level. At the current service level the staffing changes foreseen can be more simply developed, since the statutory limitation on the number of board members is not taken into account for analysis purposes. The major staffing change at the current service level would be the addition of 8 board section slices (i.e., a board section slice consists of 3 board members, 7 staff attorneys, a section secretary, and roughly 9 administrative support personnel). In addition to the staff added by the increased number of section slices, there will be added staff attorneys, management group personnel, professional support personnel, and transcriptionists. A synopsis of the staffing increases at the current service level of performance is as follows:

160 FTEE - 8 Additional Board Section Slices
- 24 Board Members
- 56 Staff Attorneys
- 8 Section Secretaries

- 72 Administrative Support Personnel

6 FTEE - Additional Staff Attorneys

6 FTEE - BVA Management Group
- 1 Deputy Vice Chairman (Medical Affairs)
- 1 Deputy Vice Chairman (Litigation)
- 4 Legal Technicians (Litigation)

6 FTEE - Professional Support Group
- 2 Medical Advisors
- 3 AIRS Indexers
- 1 AIRS Editor

25 FTEE - Additional Transcriptionists

B. Non-Personnel Cost Impact. Additional BVA Costs other than personal services associated with H.R.313 include:

1. IME opinion costs
2. Office equipment for added personnel (one-time cost)
3. Furniture/furnishings for added personnel
4. Training and supplies to support added personnel
5. Travel costs (shown separately in Cost Summary)

C. Cost Summary.

1. Considerations. Cost projections have been developed on the assumption that all changes associated with implementing H.R.313 would be made effective during Fiscal Year 1986. Payroll costs are incremented at one-percent annually. Other costs are increased using inflation rates prescribed for VA planning and budget estimates for FY 1986 - 1990. No costs have been shown for objects not included in BVA budget (i.e., office space, telecommunications, utilities and similar housekeeping costs). All costs shown are increments above current BVA budget estimates.

2. Cost Estimates. (in thousands)

Object	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990
Personal Services	$1,958	$1,977	$1,997	$2,017	$2,037
Operating Costs					
One-time	232	-			
Recurring	690	720	748	776	805
Travel	50	52	54	56	58
Total Costs	$2,930	$2,749	$2,799	$2,849	$2,900

3. Cost Estimates, Current Service Level. (in thousands)

Object	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990
Personal Svcs.	$7,105	$7,176	$7,248	$7,320	$7,393
Operating Costs					
one-time	673				
recurring	1,061	1,106	1,150	1,193	1,234
Travel	50	52	54	56	58
Total Costs	$8,889	$8,334	$8,452	$8,569	$8,685

GENERAL COUNSEL

JUDICIAL REVIEW

Retroactive Cases from 1/1/77 to 9/30/85

1. From BVA cost estimate on H.R. 313
   BVA denials during period = 202,000
   20% appeal to court = 40,400

2. The organization structure of the Office of General Counsel will be similar to that required for handling of tort actions. Primary responsibility will rest with District Counsel offices and oversight provided by Central Office. Central Office will also handle Constitutional cases.

3. Preparation and court time will require approximately 24 attorney hours per case and support (clerical) time will consume about 18 hours per case.

4. A productive workyear is assumed to be 1,534 hours (net of leave and administrative requirements).

5. First year (non-recurring) costs for each new employee will be $,000. This is for books, chairs, telephones and office equipment.

6. Recurring costs of office supplies, replacement equipment, etc. will be $700 per FTEE. Travel for this program will be approximately $8 per case for training and litigation.

7. Salaries are computed at step 4, benefits assumed at 11% of salary (historical ratio).

ARW
7/16/85

GENERAL COUNSEL

COST ESTIMATE

JUDICIAL REVIEW
H.R. 313, 99th Congress

Retroactive Cases from 1/1/77 to 9/30/85

BVA denials during period 202,000

20% appealed to court 40,400

24 attorney manhours/case .. 969,600 manhours .. 632 FTEE GS-11
18 support manhours/case ... 727,200 manhours .. 474 " GS- 5

FTEE required 1,106
(based on 1534 productive manhours/FTEE/year)

Salary Base:

GS-11 $29,018 GS-5 $15,830

Dollars in 000's

Salaries & benefits	$ 25,842.8
Non-recurring	1,106.0
Recurring	774.2
Travel	323.6
TOTAL COST	$ 28,046.6

ARW
7/16/85

GENERAL COUNSEL

JUDICIAL REVIEW METHODOLOGY
Alternative 1 - BVA board expansion denied

1. From BVA cost estimate on H.R. 313
   Annual appeals processed = 32,500
   BVA denial rate = 70 percent

2. The experience of the Social Security Administration's Bureau of Hearings and Appeals is that about 20% of denied appeals will be asserted for judicial review.

3. The organization structure of the Office of General Counsel will be similar to that required for handling of tort actions. Primary responsibility will rest with District Counsel offices and oversight provided by Central Office. Central Office will also handle Constitutional cases.

4. Preparation and court time will require approximately 24 attorney hours per case and support (clerical) time will consume about 18 hours per case.

5. A productive workyear is assumed to be 1,534 hours (net of leave and administrative requirements).

6. First year (non-recurring) costs for each new employee will be $1,000. This is for desks, chairs, telephones and office equipment.

7. Recurring costs of office supplies, replacement equipment, etc. will be $700 per FTEE. Travel for this program will be approximately $8 per case for training and litigation.

8. Salaries are computed at step 4, benefits assumed at 11% of salary (historical ratio).

ARW
7/2/85

VA FORM 2105
MAY 1983
* U.S. GOVERNMENT PRINTING OFFICE: 1984-421-488/0348

GENERAL COUNSEL

COST ESTIMATE

JUDICIAL REVIEW
H.R. 313, 99th Congress
Alternative 1 - BVA board expansion denied

BVA appeals ..... 32,500 per year

70% denials ..... 22,750 " "

20% to Judicial ..... 4,550 " "

EMPLOYMENT

GM-15 -	1	C.O.
GM-14 -	2	
GS- 5 -	1	
GS-11 -	71	Field
GS- 5 -	54	

24 attorney manhours/case ... 109,200 manhours ... 71 FTEE
18 support manhours/case ... 81,900 manhours ... 54 "
125 " field
4 " C.O.
FTEE required 129
(based on 1534 productive manhours/FTEE/year)

Salary Base:

GM-15 $57,488 GM-14 $48,873 GS-11 $29,018 GS-5 $15,830

Dollars in 000's	1986	1987	1988	1989	1990
Salaries & benefits	$3,425.6	$3,459.9	$3,494.5	$3,529.4	$3,564.7
Non-recurring	129.0	...	...	...	...
Recurring	90.3	90.3	90.3	90.3	90.3
Travel	36.4	36.4	36.4	36.4	36.4
TOTAL COST	$3,681.3	$3,586.6	$3,621.2	$3,656.1	$3,691.4

ARW
7/2/85

GENERAL COUNSEL

JUDICIAL REVIEW METHODOLOGY
Alternative 2 - BVA board expansion allowed
(Current Service Level)

1. From BVA cost estimate on H.R. 313
   Annual appeals processed = 43,350
   BVA denial rate = 70 percent

2. The experience of the Social Security Administration's Bureau of Hearings and Appeals is that about 20% of denied appeals will be asserted for judicial review.

3. The organization structure of the Office of General Counsel will be similar to that required for handling of tort actions. Primary responsibility will rest with District Counsel offices and oversight provided by Central Office. Central Office will also handle Constitutional cases.

4. Preparation and court time will require approximately 24 attorney hours per case and support (clerical) time will consume about 18 hours per case.

5. A productive workyear is assumed to be 1,534 hours (net of leave and administrative requirements).

6. First year (non-recurring) costs for each new employee will be $1,000. This is for desks, chairs, telephones and office equipment.

7. Recurring costs of office supplies, replacement equipment, etc. will be $700 per FTEE. Travel for this program will be approximately $8 per case for training and litigation.

8. Salaries are computed at step 4, benefits assumed at 11% of salary (historical ratio).

ARW
7/2/85

GENERAL COUNSEL

COST ESTIMATE

JUDICIAL REVIEW
H.R. 313, 99th Congress
Alternative 2 - BVA board expansion allowed
(Current Service Level)

BVA appeals	43,350 per year	EMPLOYMENT	
70% denials	30,350 " "	GM-15 - 1	C.O.
		GM-14 - 2	
20% to Judicial	6,070 " "	GS- 5 - 1	
		GS-11 - 95	Field
		GS- 5 - 71	

24 attorney manhours/case ...	145,680 manhours ...	95	FTEE
18 support manhours/case ...	109,260 manhours ...	71	"
		166	" field
		4	" C.O.
FTEE required		170	

(based on 1534 productive manhours/FTEE/year)

Salary Base:

GM-15 $57,488 GM-14 $48,873 GS-11 $29,018 GS-5 $15,830

Dollars in 000's	1986	1987	1988	1989	1999
Salaries & benefits	$4,346.3	$4,389.8	$4,433.7	$4,478.0	$4,522.8
Non-recurring	170.0	...	...	...	...
Recurring	119.0	119.0	119.0	119.0	119.0
Travel	48.6	48.6	48.6	48.6	48.6
TOTAL COST	$4,683.9	$4,557.4	$4,601.3	$4,645.6	$4,690.4

ARW
7/2/85

Veterans Administration

Memorandum

Date JUN 20 1985

To Acting Assistant General Counsel (022)
THRU: Director, Office of Budget and Finance (04)

From Chief Benefits Director (201E)

Subj Revised Cost Estimate H.R. 313, 99th Congress, 1st Session

1. This bill proposes to amend title 38, United States Code to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

2. As requested in your memorandum of June 11, 1985, we have revised our estimate of the subject proposal using the latest Board of Veterans Appeals assumptions. The revised five year cost to the Department of Veterans Benefits is as follows:

Fiscal Year	Judicial Review Appeals	Man Years	Administrative Cost ($000)	Benefit Cases	Benefit Cost ($000)
1986	43,223	703	$19,234	12,700	$598,840
1987	4,368	134	3,576	13,800	119,160
1988	4,368	134	3,625	14,900	127,080
1989	4,368	84	2,393	16,000	135,000
1990	4,368	84	2,412	17,100	142,920
			$31,240		$1,123,000

for R. J. VOGEL

Methodology

A) Identification of Bill - H.R. 313, 99th Congress

B) Highlights - This bill proposes to amend title 38, United States, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for the judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

C) Estimated five-year cost - See Memo

D) Employment Requirements - See Memo

E) Change in work units or caseload

Fiscal Year	Cases requiring Local Panel	Cases Remanded
1986	4,500	15,275
1987	4,500	1,300
1988	4,500	1,300
1989	...	1,300
1990	...	1,300

F) Administrative Methodology - It was assumed 4,500 claimants would request a local hearing each year during the three year test period. These hearings, which consist of three employees whose primary responsibilities include adjudicative functions, were estimated to average a total of nine hours. This includes time prior to the hearings to review each case. In addition, the Centralized Transcription Activity time was estimated at 6.6 hours to type, proof and assemble an average of twenty pages per hearing. We have also estimated that a 25% increase in formal hearings would result each year. The formal hearings were estimated to take the same amount of time to conduct as the local hearings. Additionally, informal hearings were estimated to increase 11,751 in 1986 and 2,000 in subsequent years. These informal hearings would average two hours and would not require typing. Based on conversations with members of the C&P service it was estimated that an additional 15 hours of work would be generated in DVB for each BVA decision which would be appealed to the courts. The remanded cases were costed using end product #120. In the first year, it was estimated 232,916 notification letters would be mailed out to inform claimants of their right to judicial review. The rulemaking changes were estimated at $75,000 in the first year and $50,000 in subsequent years.

The following caseload assumptions were used in costing this bill:

31,200	Annual BVA caseload
70%	of the cases would be denied.
21,840	1/
20%	of the claimants will appeal BVA decisions.
4,368	
30%	remanded by the court
1,300	remanded cases (rounded down)

1/ This caseload was increased by 232,916 in the first year due to the retroactive provisions contained in the bill.

Benefit Methodology - The benefit cost for this proposal assumes that 25% of those cases seeking judicial review will be decided in favor of the claimant. Retroactive payments were assumed to cover a three year to eleven year period, depending on the date of the claim. These retroactive payments were assumed to have a value of $21,600 to $62,000, based on the number of years of retroactive entitlement. The average annual payment per case, once on the rolls, was assumed to be $7,200.

G) Other Assumptions - (1) Personal appearances in court by DVB employees will not be necessary.

(2) BVA will supply the name, address and the appealable issue of denied BVA decisions.

(3) In costing this proposal versus previous judicial review bills we assumed a greater caseload would be affected, at a higher average benefit payment, and that there would be retro payments. The increased caseload is in part the result of a higher estimated caseload seeking judicial review as assumed by the Board of Veteran Appeals (BVA). In previous estimates we did not estimate the cases reversed by the courts, just those reversed by VA.

H) Previous Estimates - HR 798 and HR 1270, 97th Congress

I) Office and Individual Responsible for estimate A.K. Raja, Steven McLaughlin DVB Budget Staff (20IE).

Veterans Administration

Memorandum

Date MAR 2 8 1985

To Deputy Assistant General Counsel (022A)
THRU: Director, Office of Budget and Finance (04)

From Acting Chief Benefits Director (201E)

Subj Cost Estimate H.R. 313, 99th Congress, 1st Session
Current Service Level

1. This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

2. The estimated five year cost to the Department of Veterans Benefits is as follows:

Fiscal Year	Judicial Review Appeals	Man Years	Administrative Cost ($000)	Benefit Cases	Benefit Cost ($ millions)
1986	52,883	787	$21,561	13,200	$ 616.4
1987	6,300	151	4,058	14,800	140.6
1988	6,300	151	4,097	16,400	151.9
1989	6,300	101	2,882	17,900	163.2
1990	6,300	101	2,909	19,500	174.6
			$35,507		$1,246.7

John W. Hagan, Jr.

JOHN W. HAGAN, JR.

Methodology

A) Identification of Bill - H.R. 313, 99th Congress

B) Highlights - This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for the judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

C) Estimated five-year cost - See Memo

D) Employment Requirements - See Memo

E) Change in work units or caseload

Fiscal Year	Cases requiring Local Panel	Cases Remanded
1986	4,500	15,865
1987	4,500	1,890
1988	4,500	1,890
1989	...	1,890
1990	...	1,890

Administrative Methodology

F) Methodology - It was assumed 4,500 claimants would request a local hearing each year during the three year test period. These hearings, which consist of three employees whose primary responsibilities include adjudicative functions, were estimated to average a total of nine hours. This includes time prior to the hearings to review each case. In addition, the Centralized Transcription Activity time was estimated at 6.6 hours to type, proof and assemble an average of twenty pages per hearing. We have also estimated that a 25% increase in formal hearings would result each year. The formal hearings were estimated to take the same amount of time to conduct as the local hearings. Additionally, informal hearings were estimated to increase by 11,751 in 1986 and 2,000 in subsequent years. These informal hearings would average two hours and would not require typing. Based on conversations with members of the C&P service it was estimated that an additional 15 hours of work would be generated in DVB for each BVA decision which would be appealed to the courts. The remanded cases were costed using end product #120. In the first year, it was estimated 232,916 notification letters would be mailed out to inform claimants of their right to judicial review. The rulemaking changes were estimated at $75,000 in the first year and $50,000 in subsequent years.

The following caseload assumptions were used in costing this bill:

45,000	Annual BVA caseload
70%	of the cases would be denied.
31,500	1/
20%	of the claimants will appeal BVA decisions.
6,300	
30%	remanded by the court
1,890	

1/ This caseload was increased by 232,916 in the first year due to the retroactive provisions contained in the bill.

Benefit Methodology

The benefit cost for this proposal assumes that 25% of those cases seeking judicial review will be decided in favor of the claimant. Retroactive payments were assumed to cover a three year to eleven year period, depending on the date of the claim. These retroactive payments were assumed to have a value of $21,600 to $62,000, based on the number of years of retroactive entitlement. The average annual payment per case, once on the rolls, was assumed to be $7,200.

G) Other Assumptions - (1) Personal appearances in court by DVB employees will not be necessary.

(2) BVA will supply the name, address and the appealable issue of denied BVA decisions.

(3) In costing this proposal versus previous judicial review bills we assumed a greater caseload would be affected, at higher average benefit payments, and that there would be retro payments. The increased caseload is in part the result of a higher estimated caseload seeking judicial review as assumed by the Board of Veteran Appeals (BVA). In previous estimates we did not estimate the cases reversed by the courts, just those reversed by VA.

H) Previous Estimates - HR 798 and HR 1270, 97th Congress

I) Office and Individual Responsible for estimate Richard Smith, Steve McLaughlin DVB Budget Staff (201E)